SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

October 1965 Term

No. 866

NECCHI SEWING MACHINE SALES CORP.,
Petitioner,

against

NECCHI S.P.A.,
Respondent.

PETITIONER'S REPLY BRIEF

SAMUEL B. HERBST
Attorney for Petitioner
521 Fifth Avenue
New York, New York 10017
MU 2-0567

GEORGE TROSK
Of Counsel

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Respondent states (R. B. p. 7)* that the petition for a writ of certiorari in *Lawrence* was "dismissed," without mentioning, as was the fact, that the dismissal was not after a hearing or on the merits, but on the stipulation of counsel because the case had been settled.

Respondent also says (R. B. p. 10) that the granting of the petition in *Lawrence* is irrelevant here because the issues there were different from those here.

* Unless otherwise indicated by the context, numerals in parentheses will refer as follows: when preceded by "M.B.", to petitioner's main brief in this Court; when preceded by "Supp.", to the supplementary pages of petitioner's main brief; when preceded by "R.B.", to respondent's brief in this Court; and when preceded by "App.", to petitioner's brief in the Court below.

The substantive question in *Lawrence,* as we stated (M. B. p. 17), was the claim that defendant had fraudulently induced the plaintiff to enter into the agreement there involved. However, insofar as related to the point with which this Court is presently concerned, the question in *Lawrence was precisely the same as the one here,* i.e., as stated in the petition there (M. B. p. 17):

> "Whether the validity and interpretation of the arbitration clause of the contract in this case is governed by Federal law, i.e., the Federal Arbitration Act, or by local law."

It can tend only to confuse the issue here by ignoring this, as respondent does, and referring merely to the lack of identity in the substantive issues.

Respondent labels as "spurious" (R. B. p. 10) petitioner's statement that the state and federal rules concerning the power of arbitrators to interpret the arbitration clause are not in accord (M. B. pp. 15-17). We need not labor the point: suffice it to say that the learned court below expressly referred to the conflict in its opinion in *Lawrence* (271 F. 2d 402 at p. 412) as did also the Court of Appeals in the First Circuit in *Lummus* (280 F. 2d 915 at pp. 924-5).

Though we quoted the relevant portions of the opinions in both these cases (M. B. pp. 17, 18), respondent makes no reference to either of them.

Indeed, as we also pointed out (M.B. p. 16), the conflict is not between federal and state courts alone: it exists among the federal Courts of Appeal themselves, as appears from a comparison of *Lawrence* (2C.) on the one hand, with

Lummus (1C.), *Ross* (9C.) and *American Air Lines* v. *Louisville* (6C.) on the other.

This, too, is not mentioned in respondent's brief.

The learned Court of Appeals recognized that if the language of the arbitration clause is broad enough, it confers power on the arbitrators to determine the scope of the arbitration clause itself. It denied the arbitrators the right to do so here, saying:

> "The arbitration clause is broad, but not that broad,"

and yet, referring to the arbitration clause in *Lawrence*, which was not as broad as the one here, the same Court said:

> "It would be hard to imagine an arbitration clause having greater scope than the one before us."

In *Lipman* (289 N. Y. 76, 80, 1942), the New York Court of Appeals held that a clause for the arbitration of "any and all controversies in connection with, and/or arising out of, this contract" gives the arbitrators jurisdiction to determine all issues in relation to the contract "except the making thereof"; and in *Uddo* (1964, 21 A .D. 2d 402) the New York Appellate Division, First Department, referring to clauses providing for the arbitration of any question that may arise under or in connection with the making, meaning or performance of a contract, referred to *Lipman* and said:

> "Under such clauses any question beyond the physical execution of its contract would by its terms be one for the arbitrators."

This, as that Court pointed out, does not conflict with the rule that it is for the court to determine what the parties agreed to:

> "[i]t merely means that where they have agreed to arbitrate everything, there is nothing for the court to decide beyond that they have so agreed".

Respondent by a selective quotation from *Exercycle* (1961, 9 N. Y. 2d 329, 334) seeks to convey the impression that in that case the New York Court of Appeals supports respondent's position and that Judge Ryan's interpretation here was in error. The full statement of that Court on the point discloses the contrary (9 N. Y. 2d at pp. 334-335):

> "Once it be ascertained that the parties broadly agreed to arbitrate a dispute 'arising out of or in connection with' the agreement, it is for the arbitrators to decide what the agreement means and to enforces it according to the rules of law which they deem appropriate in the circumstances.
>
> "It has long been this State's policy that, where parties enter into an agreement and, in one of its provisions, promise that any dispute arising out or in connection with it shall be settled by arbitration, any controversy which arises between them and is within the compass of the provision must go to arbitartion. Civil Practice Act, §1448; see, e.g., Matter of Kelley, 240 N. Y. 74, 79, 147 N. E. 363, 364; Marchant v. Mead-Morrison Mfg. Co., 252 N. Y. 284, 298, 169 N. E. 386, 390; Matter of Lipman [Haeuser Shellac Co.], 289 N. Y. 76, 43 N. E. 2d 817, 142 A. L. R. 1088; Matter of Terminal Auxiliar Maritima [Winkler], 6 N. Y. 2d 294, 189 N. Y. S. 2d 655. As the court wrote in Matter of Marchant (252 N. Y. at page 298, 169 N. E. at page 391), 'Parties to a contract may agree, if they will, that

> any and all controversies growing out of it in any way shall be submitted to arbitration. If they do, the courts of New York will give effect to their intention.' "

We submit that when the parties here agreed upon arbitration *"ex bono et aequo"* of:

> "All matters, disputes or disagreements arising out of or in connection with this agreement",

they, too, "agreed to arbitrate everything".

We called attention (M. B. pp. 19-21) to the fact that under the Federal Arbitration Act (9 U. S. C. §4), if there be an issue as to arbitrability, the Court is required to hold a "trial". We pointed out, further, that if the question here is for the Court, it should be remanded to the District Court, inasmuch as no trial has been held here because the learned District Court was of the opinion that the issue was for the arbitrators, not for the Court. This explains why, on the question now involved, the record here is, as the learned Court below described it (Supp. p. 30), "meager."

Respondent does not discuss this.

The learned Court of Appeals, while recognizing (Supp. pp. 32-33) that the matters referred to in items 1, 2, 3, 6, 7, and 9 of petitioner's demand for arbitration "would not have arisen" except for the existence of the distributorship agreement, nevertheless denied arbitration of these items on the ground that they arise out of the "working relationship" between the parties rather than "out of or in connection with the agreement".

We noted (M. B. p. 12) that the learned Court of Appeals evidently overlooked the provision of the agreement which specifically states that it "confirms" what the parties had agreed would be "the terms and conditions that are to govern [their] business relation"; and consequently, since Necchi's direct dealings with petitioner's distributors were, as the learned Court below held they were, a violation of the "working relationship" between the parties, such dealings were, *ipso facto,* a violation of the agreement, and presented a claim "arising out of or in connection with this agreement."

As to this, too, respondent stands mute.

The learned Court of Appeals held that items "1" and "2" of petitioner's demand for arbitration, based on Necchi's direct sales to petitioner's distributors, were not arbitrable; these "practices" it said, were not governed by the agreement and, therefore, did not violate it. That position, as we showed (M. B. pp. 9, 28-29) was contrary to the salutary and universally recognized rule of law that it is a part of every contract, even if not expressed, that one may not derogate from his own grant, which a manufacturer does when he competes with his own exclusive distributor by selling directly to the latter's dealers. (*Wood* v. *Lucy, Lady Duff-Gordon,* Cardozo, J., 222 N. Y. 88 (1917); see Restatement (Second) Agency, sec. 434.)

As to this, respondent's brief is also silent.

Petitioner contends (M. B. pp. 22-29) that the learned Court of Appeals erred in denying arbitration of item "8" of petitioner's demand for arbitration, which is based on

Necchi's refusal to negotiate in reference to an extension of petitioner's distributorship agreement. Instead of meeting that contention, respondent asserts (R. B. p. 13) that "by verbal tricks", and by language "calculated to mislead", petitioner "seeks to create the impression" that the agreement contains "a binding obligation" on Necchi to renew the agreement, and (pp. 13-14) since the agreement contains no such obligation, there is no merit to petitioner's claim that it was error for the Court to deny arbitration of item "8". This argument is a man of straw: petitioner has never contended, and does not contend, that the agreement contains a provision obligating Necchi to renew or extend it, or that petitioner is entitled to arbitration because of Necchi's failure to do so. Respondent utterly disregards the pertinent words of the contract prepared by it. Respondent did not have, as it asserts it had, "an absolute right not to renew petitioner's distributorship" (R. B. p. 13). What petitioner does contend is that a preliminary matter had to occur, i.e. that by "6 months before the expiration of this agreement" a meeting between the parties "will have to take place", "for the examination of the extension or for the negotiation of new agreements" (Supp. pp. 5, 12-13); that, therefore, respondent was under a contractual obligation to enter into such a negotiation and to conduct it in good faith, and that its refusal to do so entitles petitioner to such relief as the arbitrators might find appropriate in the premises. For this proposition, we cited two (2) cases, both of which so hold (M. B. pp. 24-29). One is in the New York Court of Appeals (*De Laurentiis,* 9 NY 2d 502 (1961)) and the other is in the United States Court of Appeals for the District of Columbia (*Helms,* 249 F. 2d 482 (1957)). Respondent's brief would have been more to

the point if it had discussed these cases, which it does not do, and not an irrelevant proposition for which petitioner has never contended.

The appropriate relief would not necessarily be damages alone. Clearly relief could include a finding that the contract did not expire because of the failure to comply with the obligation to meet and negotiate in good faith six months before the expiration could occur. Cf. *Colony Liquor Distributors* v. *Jack Daniel Distillery etc.* (22 A. D. 2d 247, 254 N. Y. S. 2d 547, 1965) where the relief for failure to give reasonable notice of termination of an oral distributorship was extension of the term of the agreement.

It is undenied that while petitioner was Necchi's exclusive distributor, it spent approximately $10,000,000.00 in advertising and promoting the Necchi name and machine. By cutting off petitioner's distributorship without negotiating about an extension, in violation of the terms of the agreement, respondent has wrongfully misappropriated to itself the continuing benefits of this expenditure by petitioner, and has deprived petitioner of any further opportunity of recoupment. This is the subject of item 9 of petitioner's demand for arbitration. Though the learned Court of Appeals recognized (Supp. pp. 32-33) that

> "common law principles of restitution might well support this claim for reimbursement"

it took from petitioner the right to have arbitrators pass on it, on the ground that the claim did not arise out of or in connection with the agreement (Supp. pp. 32-34). We pointed out (M. B. pp. 24-27) that this was error; that since the claim for reimbursement was an outgrowth of, and

directly referable to, respondent's violation of its agreement to negotiate about a renewal, the claim did arise out of or in connection with the agreement, and it was for the arbitrators to determine whether or not petitioner should have redress therefor, and if so, the nature and amount thereof.

As to this, like the other points above discussed, respondent says nothing.

Thus far, we have referred to the items of the demand only from the point of view of their strictly *legal* basis. However, as we pointed out (M. B. p. 27) arbitrators are not limited to the consideration of only such claims as are *legally* redressable; as this Court noted in *Steelworkers* (363 U. S. 574, 1960), parties often agree to submit their disputes to arbitrators for the very reason that they anticipate the possibility of claims which courts might be unwilling to entertain, or deem lacking on a strictly legal basis, whereas arbitrators are free to consider them. The learned Second Circuit said the same thing in the *Greenwich Marine* case (339 F. 2d 901, 1965), in which Judge Marshall, who also wrote the opinion here, said (p. 908):

> "A dispute may be arbitrable within the specific meaning of the arbitration clause, and not give rise to a justiciable cause of action * * *"

We noted further (M. B. pp. 24-29) that this is particularly applicable here, where the agreement expressly provides that the arbitrators are to decide the issues submitted to them *"ex bono et aequo,"* and that no appeal is to lie from their determination. This, we also pointed out (M. B. p. 27), is in accord with the New York State statute (CPLR,

Section 7051), which makes "enforceable" a written agreement to arbitrate "without regard to the justiciable character of the controversy", and directs that "the court shall not consider whether the claim with respect to which arbitration is sought is tenable, or otherwise pass upon the merits of the dispute".

None of this is referred to, much less discussed, in respondent's brief.

Conclusion

The denial of arbitration in a case where a party is entitled to it is not a mere procedural error: as this Court observed in the *Steelworkers* case (363 U. S. 564, 567-8)

> "the moving party should not be deprived of the arbitrator's judgment, when it was his judgment and all that it connotes that was bargained for"

and moreover, as this Court said in *Bernhardt* (350 U. S. 198, 1955) a change from a court of law to an arbitration panel

> "may make a radical difference in the ultimate result".

Respectfully submitted,

SAMUEL B. HERBST
Attorney for Petitioner

GEORGE TROSK
Of Counsel

February 15, 1966.